Supreme Court, U.S.
FILED
JAN 31 2001
OFFICE OF THE CLERK

(3)

No. 00-977

In The
Supreme Court of the United States

ROBERT H. BARRETT,
Petitioner,

v.

BOROUGH OF CARLISLE,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Robert H. Barrett
Petitioner, *pro se*
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25pp

QUESTIONS PRESENTED

(Unchanged from Petition for Writ of Certiorari)

1. Whether property owners were deprived of rights to due process in alleged proceedings before the historic certification authority, in violation of 42 U.S.C. § 1983?

2. Whether property owners were deprived of rights to just compensation for the regulation of their property, absent Constitutionally valid historic certification, in violation of 42 U.S.C. § 1983?

3. Whether Petitioner established excusable neglect or good cause for extending the time for filing a notice of appeal under 28 U.S.C. § 2107(c)?

4. Whether the Appellate Court has jurisdiction to hear the appeal?

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ADDITIONAL CASE FACTS

Although the Borough of Carlisle (herein, "the Borough") has alleged that the Carlisle Historic District was certified by the State historic certifying authority, e.g., the Pennsylvania Historical and Museum Commission (herein, "the State Commission"), neither the Borough nor the State Commission has ever produced an official document or any other factual evidence that the Carlisle Historic District was actually certified by the State Commission.

Neither the Borough nor the State Commission has ever produced any evidence of the alleged certification procedure, including certification criteria, notification of property owners, supporting evidence, analyses of specific properties, reasons for district boundaries, or anything else.

The Common Pleas Court of Cumberland County, Bayley, J., at No. 96-2446 Civil Term denied Petitioner, Robert H. Barrett (herein, "Barrett"), a subpoena against the State Commission to produce its records leading to its alleged certification of the Carlisle Historic District. (See pp. C1-C2 of this brief and the Petition for Writ of Certiorari, p. H15.)

In the Common Pleas Court, Barrett did not seek to overturn the Carlisle Historic District. Rather, Barrett asked only that the Court order the Borough to issue a demolition permit for the building situate at 134-138 East High Street, Carlisle. (See p. A6 of this brief.)

Later, when Barrett filed the immediate Federal Complaint, the primary relief requested was to overturn the

Carlisle Historic District. Issuance of a demolition permit was a secondary issue intended to demonstrate to the Court the actual harm caused by regulation of the Carlisle Historic District. (See Petition for Writ of Certiorari, p. G5.)

In a subsequent Federal Complaint currently before the United States Court of Appeals for the Third Circuit at No. 00-1515, Barrett again requested primary relief to overturn the Carlisle Historic District. The secondary issue intended to show the actual harm caused by regulation of the Carlisle Historic District was the denial of building permits to perform work on buildings owned by Barrett within the Carlisle Historic District.

In a third case to be submitted to the United States Supreme Court, Barrett will ask the Court to overturn a default judgment against Barrett by the Common Pleas Court of Cumberland County, Bayley, J., No. 98-4145 Equity, which appointed an agent to physically take possession of eight (8) improved properties owned by Barrett within the Carlisle Historic District for, *inter alia*, refusing to comply with historic district regulations and refusing to allow warrantless searches of Barrett's papers under discovery proceedings. This case also involves Barrett's imprisonment on two (2) occasions for civil contempt of court for refusing to allow warrantless searches of his properties and papers under discovery proceedings.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. **The Borough misrepresented to the Court the Constitutional violations in establishing the Carlisle Historic District.**

In its Response to Petition for Writ of Certiorari, the Borough stated as follows: "The historic district was enacted pursuant to Borough Ordinance and in accordance with mandated statutory and regulatory procedures." (See Response to Petition for Writ of Certiorari, p. 4.)

This statement is blatantly false because (1) the State Commission violated the due process protections of the Fifth and Fourteenth Amendments to the United States Constitution in the alleged historic certification process, and (2) the Borough violated the just compensation provisions of the Fifth and Fourteenth Amendments by regulating property within the Carlisle Historic District absent valid historic certification.

There is no factual evidence to support the alleged certification of the Carlisle Historic District. In fact, the Carlisle Historic District is a district in name, only. There is no factual evidence that the State Commission ever certified the Carlisle Historic District. Further, there is no factual evidence that the State Commission ever conducted a certification procedure which (1) used valid certification criteria, (2) developed substantial supporting evidence for certification, and (3) afforded property owners due process of

law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

The Common Pleas Court of Cumberland County, Bayley, J., at No. 96-2446 Civil Term specifically denied Barrett a subpoena against the State Commission to produce its records leading to its alleged certification of the Carlisle Historic District. (See pp. C1-C2 of this brief and the Petition for Writ of Certiorari, p. H15.)

Absent valid historic certification, there is no lawful basis for the taking of property rights through regulation of property within the Carlisle Historic District.

II. The Borough misrepresented to the Court the significant difference in relief requested between Petitioner's State and Federal Complaints.

In its Response to Petition for Writ of Certiorari, the Borough stated the following about Barrett's Federal Complaint: "The underlying Complaint in this action revolves around Petitioner's attempt to demolish three residential structures owned by him and located within an historic district in the Borough of Carlisle, Cumberland County, Pennsylvania." (See Response to Petition for Writ of Certiorari, p. 4.)

The Borough further stated: "Petitioner next filed suit in the Federal District Court for the Middle District of Pennsylvania, seeking essentially the same relief that he was unable to obtain in State Court."

In fact, Barrett's State Complaint was limited to

obtaining a demolition permit. Barrett did not attempt to overturn the Carlisle Historic District in the Common Pleas Court. This is absolutely clear from the requested relief of the State Complaint. (See p. A6 of this brief.)

In contrast, Barrett's Federal Complaint was filed primarily to overturn the Carlisle Historic District. Overturning the Carlisle Historic District was the primary relief requested in the Federal Complaint. (See Petition for Writ of Certiorari, p. G5.)

In order for Barrett's claim to be considered ripe in Federal Court, Barrett had to show specific harm. Barrett included the denial of the demolition permit by the Borough for the purpose of demonstrating specific harm. Had Barrett claimed a less egregious harm such as the denial of paint colors, Barrett reasoned that the Court might not afford the case serious consideration. But the primary issue in the Federal Complaint was the constitutionally flawed certification of the Carlisle Historic District, not the simple denial of the demolition permit.

The denial of the demolition permit is but one example of the broad range of regulations imposed on property owners within the Carlisle Historic District and the abuse of police power by the Borough. The Borough's historic district regulations effectively eliminate all property rights to the exterior of property. Under these regulations, there is nothing a property owner can do to the exterior of his property without the approval of the Carlisle Borough Council.

The immediate and subsequent cases clearly demonstrate the scope of historic district regulations and the abuse of police power which include (1) denial of demolition permits, (2) denial of building permits to perform work on properties, (3) the physical taking of property for refusing to comply with historic district regulations, (4) issuance of property maintenance citations in the absence of public fire, safety, or health hazards, (5) the condemnation of property without cause, and (6) the imprisonment of a property owner for refusing to allow warrantless searches of his property and papers.

III. The Borough misrepresented to the Court the timeliness of Barrett's First Motion to the Federal District Court seeking extension of time to appeal.

In its Response to Petition for Writ of Certiorari, the Borough stated the following in its Counterstatement of Questions Presented: "... and where Petitioner's Motions to seek extension of time to appeal for good cause were brought more than thirty days after expiration of the time to appeal ..." (See Response to Petition for Writ of Certiorari, p. i.)

The Federal District Court dismissed the immediate Complaint on July 21, 1999, during Barrett's first period of incarceration from July 07, 1999 until August 17, 1999.

Per Title 28, United States Code, section 2107(c), "The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of

excusable neglect or good cause."

Barrett's First Motion to extend the time for filing an appeal was filed on September 07, 1999, only eighteen (18) days after expiration of the time otherwise set for bringing an appeal, but clearly within the thirty (30) day period allowed under 28 U.S.C. §2107(c) for requesting an extension of the appeal period.

On October 14, 1999, the Federal District Court denied Barrett's First Motion to extend the time for appeal. At that time, Barrett was incarcerated in county prison a second time for refusing to allow warrantless searches of his papers. It was not until his release on November 22, 1999 that Barrett first learned of the Federal District Court's denial of his First Motion to extend the time for appeal. On November 30, 1999, Barrett filed his Second Motion to extend the time for appeal. This filing was clearly within thirty (30) days of the time when he first learned of the Federal District Court's denial of his First Motion, and therefore timely filed.

IV. Barrett's imprisonment for refusing to allow warrantless searches of his properties and papers violated Barrett's rights under the Fourth Amendment and constituted excusable neglect or good cause for extending the time for filing an appeal.

Violation of Barrett's rights under the Fourth Amendment to the United States Constitution by the Common Pleas Court of Cumberland County, Bayley, J. at

No. 98-4145, was unlawful. The County Court failed to establish probable cause for the searches and failed to issue Search Warrants. Under the guise of discovery, the County Court ordered searches which clearly violated the Fourth Amendment. When Barrett refused to allow the searches, he was imprisoned first for forty-one (41) days, then again for forty (40) days. The Federal District Court abused its discretion in the immediate case by refusing to extend the time for appeal due to the periods of unlawful imprisonment. On January 08, 2001, the Supreme Court of Pennsylvania denied Barrett's petition for allowance of appeal in the State equity case involving the unlawful searches. Barrett will appeal the case to the United States Supreme Court.

CONCLUSION

For the reasons set out, Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

By: Robert H. Barrett

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Dated: January 31, 2001

APPENDIX A

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

NO. 96-2446 CIVIL TERM

ROBERT H. BARRETT,
Appellant

v.

BOROUGH OF CARLISLE,
Appellee

(dated May 3, 1996)

LOCAL AGENCY LAW APPEAL

AND NOW, comes Robert H. Barrett, by and through his attorney, William A. Hebe, Esquire, and files this Local Agency Law Appeal and, in support thereof, asserts the following:

1. Appellant, Robert H. Barrett, is an adult resident of Cumberland County, Pennsylvania, residing at 134 East High Street, Carlisle.

2. Appellant is the owner of real estate situate in the Borough of Carlisle, Cumberland County, Pennsylvania,

being parcels of real estate designated 134, 136, and 138 East High Street.

3. By Application dated February 12, 1996, Appellant applied to the Borough of Carlisle for a permit to demolish the buildings at 134, 136 and 138 East High Street and fill the cellars. (A copy of the Application is attached hereto as Appendix "A.")

4. The parcels of real estate in question are situate in what is known as the Carlisle Historic Preservation District. (A copy of the Carlisle Code applicable to Historic Preservation Districts is attached hereto as Appendix "B.")

5. A hearing was held before the Borough of Carlisle Historical Architecture and Review Board on March 18, 1996.

6. Appellant is not in possession of any official report prepared by the Historical Architecture and Review Board.

7. Borough Council considered at its meeting of April 8, 1996, the issue of Appellant's request to demolish the structures in question.

8. By correspondence dated April 15, 1996, Appellant was advised by the Borough of Carlisle that it had disapproved a Certificate of Appropriateness for him to gut and demolish the buildings at 134, 136 and 138 East High Street. (A copy of the notification is attached hereto as Appendix "C.")

9. Appellant believes and, therefore, avers that Borough Council's decision denying his requested Certificate

of Appropriateness should be vacated and reversed by the Court and an Order entered directing Borough Council to grant Appellant's requested Certificate of Appropriateness for the following reasons:

A. Borough Council's decision denying Appellant's requested Certificate of Appropriateness constitutes a taking without just compensation, in violation of Article I Section 10 of the Constitution of the Commonwealth of Pennsylvania and the Fifth and Fourteenth Amendments to the United States Constitution.

B. The original designation of the Historic District in the Borough of Carlisle was based upon insufficient and inadequate evidence to support such a designation so that the original action was an improper, unauthorized and illegal exercise of police powers by the Borough of Carlisle.

C. The Historic District in the Borough of Carlisle is drawn and designated without reference to or consideration of the specific structures and properties located therein. For example, there was no finding by the Commonwealth of Pennsylvania or the Borough of Carlisle that the specific parcels involved in the instant case were of historical or architectural significance.

D. In originally establishing the Historic District in the Borough of Carlisle, the Pennsylvania State Historic and Museum Commission failed to meet its burden in certifying the Carlisle Historic District. There has been no comprehensive survey of properties within the Historic

District, and the establishment thereof was arbitrary, capricious and overly broad and amounts to a taking of property, in violation of Appellant's constitutional rights.

E. There is no basis to support designating the specific properties involved in the instant case as historically or architecturally significant or important.

F. The Historical Architectural Review Board failed to give counsel and consider the factors as required by Carlisle Code Sections 255-123 through 255-128.

G. The Historical Architectural Review Board failed to provide the Appellant with the notices required by Carlisle Code Section 255-129.

H. To the best of Appellant's information, knowledge and belief, the Board failed to provide its counsel to Borough Council in accordance with the provisions of Carlisle Code Section 255-130.

I. Borough Council failed to conduct its review pursuant to the provisions of Carlisle Code Section 255-131.

J. Borough Council failed to meet the time requirements set forth in Carlisle Code Section 255-131 inasmuch as Borough Council's decision occurred at its meeting of April 8, 1996, and notice was not sent to Appellant until April 15, 1996. The Code requires notice within five days after Borough Council makes its decision. Therefore, Appellant's Application is deemed granted for failure of Borough Council to comply with the five-day requirement.

K. It may also be that Council failed to render its decision in accordance with the 40-day requirement of Carlisle Code Section 255-131, Section H. Appellant is unaware of the date when Council received the Board's recommendations, so Council's decision may be beyond the 40-day requirement of the above section, and the Application should be deemed granted for violation of that time line as well.

L. The enabling legislation authorizing the establishment of the Carlisle Historic District is void for vagueness.

M. The original process which resulted in certification of the Historic District is constitutionally defective inasmuch as there was no provision for notice to individual property owners.

N. The Historic District ordinance as established by the Borough of Carlisle is in the nature of a zoning ordinance, yet it makes no provision for special exceptions, variances, or continuing nonconforming uses, so that it clearly constitutes a taking with regard to any use of property within the Historic District which does not strictly conform to the ordinance or decisions of the Historical Architectural Review Board and/or Borough Council.

O. The establishment and certification of the Historic District bears no relationship to public health, safety, welfare or morals, thus constituting an *ultra vires* act of Borough Council.

P. The Carlisle Historic District ordinance is

void for vagueness inasmuch as no specifics are set forth with regard to permitted or unpermitted uses of property within the certified Historic District.

Q. The enabling legislation which authorizes the creation of historic districts in boroughs in Pennsylvania is an unlawful delegation of police power inasmuch as there are no standards or criteria flowing with the delegation to the municipal body enacting the local ordinance.

R. To the extent that the Historic District ordinance as adopted by the Borough of Carlisle is, in fact, a zoning ordinance, it was enacted in violation of the Pennsylvania Municipalities Planning Code.

S. The "adjudication" of Borough Council adopted April 8, 1996, and set forth in Appendix C attached hereto contains no findings or conclusions, in violation of the Pennsylvania Local Agency Law.

WHEREFORE, Appellant, Robert H. Barrett, prays your Honorable Court enter an Order reversing the decision of Carlisle Borough Council entered April 8, 1996, and contained in Appendix C attached hereto, and, further, order and direct the Borough of Carlisle to grant Appellant's Application for demolition of structures at 134, 136 and 138 East High Street, Carlisle, Cumberland County, Pennsylvania, and grant such further relief as may be appropriate.

SPENCER, GLEASON, HEBE & RAGUE, P.C.

By: _____

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APPENDIX B

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

NO. 96-2446 CIVIL TERM

ROBERT H. BARRETT,
Appellant

v.

BOROUGH OF CARLISLE,
Appellee

(dated April 23, 1997)

AMENDMENT TO LOCAL AGENCY LAW APPEAL

And now, this 23rd day of April, 1997 comes Robert H. Barrett and files this Amendment to the Local Agency Law Appeal and, in support thereof, asserts the following:

1. Paragraph number 9 on page 2 of subject appeal reads as follows:

> 9. Appellant believes and, therefore, avers that no full and complete record of the proceedings was made before Borough Council and requests that the Court determine the matter *de novo*.

2. Appellant requests that the paragraph described

above be deleted and replaced with the following paragraph:

9. Appellant requests the Court determine the matter *de novo* because the Borough of Carlisle lacks authority to determine the appropriateness of the Pennsylvania Historic and Museum Commission decision authorizing the Carlisle Historic District.

Robert H. Barrett
134 East High Street
Carlisle, PA 17013

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

NO. 96-2446 CIVIL TERM

ROBERT H. BARRETT,
Appellant

v.

BOROUGH OF CARLISLE,
Appellee

(dated April 23, 1997)

PETITION FOR ORDER TO PRODUCE

And now, this 23rd day of April, 1997 comes Robert H. Barrett and petitions your Honorable Court as follows:

1. Under the provisions of Act 167 of June 13, 1961, P.L. 282, the Pennsylvania Historical and Museum Commission (henceforth, the Commission) is authorized to approve historic districts within the Commonwealth of Pennsylvania. The original Act has been amended and is presently found at 53 Pa.C.S. Section 8002.

2. A local historic district is not recognized under the Act until the Commission certifies to the historical

significance of the district.

3. The Commission approved the Carlisle Historic District on October 1, 1975.

4. The Commission approval process for the Carlisle Historic District was fatally flawed.

5. The Commission decision approving the Carlisle Historic District was fatally flawed.

6. Neither Appellant nor Carlisle Borough are in possession of complete or adequate records of the Commission approval process or basis for approval of the Carlisle Historic District.

Wherefore, Petitioner prays your Honorable Court enter an Order against the Pennsylvania Historical and Museum Commission to produce all materials and records associated with the approval of the Carlisle Historic District.

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